

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 07-125
Washington, D.C. 20554

In the Matter	)	EB Docket No. 07-147
)	
PENDELTON C. WAUGH, CHARLES M.	)	File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC.	)	NAL/Acct. No. 200732080025
)	
Licensee of Various Site-by-Site)	
Licenses in the Specialized Mobile	)	FRN No. 0003769049
Radio Service)	
)	
PREFERRED ACQUISITIONS, INC.)	
	)	FRN No. 0003786183
)	
License of Various Economic Area)	
Licenses In the 800 MHz Specialized)	
Mobile Radio Services)	
)	

To: The Commission

**PETITIONER'S REPLY TO ENFORCEMENT BUREAU'S OPPOSITION
TO PETITION TO INTERVENE AND REVOKE LICENSES.**

Of Counsel:
ASHFORD & WRISTON
A Limited Liability Law Partnership LLP

KEVIN W. HERRING 6722-0
STEVEN R. GRAY 9434-0
Alii Place, Suite 1400
1099 Alakea Street
Honolulu, HI 96813
Telephone: (808) 539-0400

Attorneys for Petitioner/
Interested Party
Toshiaki Saito

**PETITIONER'S REPLY TO ENFORCEMENT BUREAU'S OPPOSITION
TO PETITION TO INTERVENE AND REVOKE LICENSES.**

TOSHIAKI SAITO ("Petitioner"), by and through his attorneys, Ashford & Wriston a Limited Liability Law Partnership LLP, submits this Reply to the Enforcement Bureau's ("Bureau") February 15, 2012, Opposition to Petition to Intervene and Revoke Licenses ("Opposition"). This Reply is limited to matters raised in the Opposition, which Opposition misinterprets Mr. Saito's Petition to Intervene and Revoke Licenses ("Petition") in several crucial respects.

I. Mr. Saito's Petition Is Not Procedurally Deficient.

The Petition's clearly stated purposes¹ are to request intervention as a party under Section 1.223(c) and to request that the Commission revoke the licenses Preferred Communications Systems, Inc. and Preferred Acquisitions, Inc. (collectively, "Preferred") fraudulently-acquired.^{2,3} Because the licenses cannot be revoked without invalidating

¹ Opposition 2:2 (The Opposition inaccurately stated that Petitioner's "*sole stated purpose* for seeking to intervene in this proceeding is to Oppose the Settlement Agreement.")

² Such a request to revoke licenses is contemplated by Section 1.1202(d) ("Unless otherwise ordered by the Commission, the following persons are parties: . . . (2) Any person who files a complaint or request to revoke a license or other authorization").

³ It appears that the Bureau may have mistaken the sections cited in note 2 of the Petition as intended to each be a separate potential means for becoming a party. Additionally, the Bureau appears to have mistaken these rules as a substitution to the petition to intervene, when they were intended, if necessary, as a substitution for the petition to revoke licenses. While it could have been clearer, the cited sections were intended to suggest that if the part of the Petition that is a petition to

the Settlement Agreement, and reauctioning the licenses would likely flow as a natural consequence of license revocation, these requests are at the very least interrelated. Even if the Petition contains separate requests,⁴ this is not fatal to the Petition because the requests are directed exclusively to the Commission.⁵

According to the Bureau, the Petition is procedurally deficient, in part because

Section 1.223(b) of the Commission's rules requires that petitions must be filed, if at all, within 30 days after publication of the hearing designation order or of a summary thereof in the Federal Register.⁶

The Opposition takes much liberty in replacing Section 1.223(b)'s language "may file" with the words "requires" and "must file."⁷ This

revoke licenses were not allowed, that such part be treated as a petition to deny auctionable licenses, under Section 1.939, based on the information Preferred misrepresented in its September 27, 2000, long-form application. Since no petition to deny was filed within the timeframe specified by 1.2108 (and this due to the fact that no party besides Preferred was aware of its misinformation at the time of filing), Petitioner respectfully requested that the Commission invoke Section 1.3 to waive the deadline for filing a petition to deny.

⁴ Opposition, 2:3 ("Petitioner makes multiple requests for relief in his single pleading").

⁵ Section 1.44. Furthermore, there are instances where several unrelated topics are *required* to be addressed in a single pleading, as in replies to oppositions.

⁶ Opposition, 2:4.

⁷ Section 1.223(b) states that:

Any other person desiring to participate as a party in any hearing may file a petition for leave to intervene not later than 30 days after the publication in the Federal Register of the full text or a

crucial substitution results in an interpretation of the rule that, if accepted as it reads, would disallow the filing of petitions pursuant to Section 1.223(c). However, Section 1.223(c) allows “any persons desiring to file a petition for leave to intervene **later than 30 days after** the publication in the Federal Register”⁸ to do so when certain criteria are met.

Here, Petitioner meets Section 1.223(c)’s criteria. His Petition presents information that will assist the Commission in determining whether or not to approve the settlement, such as bringing to the forefront evidence regarding the existence of Pendleton Waugh’s (“Waugh”) trust. Furthermore, Petitioner respectfully disagrees with the Bureau’s position that issues relating to the settlement are pending before the Commission in a vacuum, divorced from the issues presented in the Order To Show Cause, which clearly contemplates license revocation.⁹

summary of the order designating an application for hearing or any substantial amendment thereto.

⁸ Even absent Section 1.223(c), the Bureau’s statement that “a request for intervention in this proceeding should have been filed, **if at all**, under Section 1.223(b), by August 31, 2007,” is false since a petition to intervene can also be filed, under Section 1.223(b), within 30 days “of any substantial amendment” to the “order designating an application for hearing.” Opposition, 2:3 (bold font added). It seems within the realm of possibility that a proposed settlement agreement might be considered a substantial amendment to such an order.

⁹ Opposition, 5:8 (“the Bureau notes that the only matter pending before the Commission is whether to approve the settlement in this case. To the extent that Petitioner offers any information relevant to whether the

When the challenge to the settlement was filed, the effect of the administrative law judge's previous approval of the settlement was stayed under Section 1.302. Because the ruling is stayed, the proceedings stemming from the Order To Show Cause have not been completed, and the issues presented therein, in Petitioner's view, are still pending before the Commission. Furthermore, even the Bureau's Opposition appears to characterize the present proceeding as an "adjudicatory *revocation* hearing proceeding."¹⁰ Thus, the information Petitioner has submitted relating to license revocation "will assist the Commission in the determination of the issues in question."¹¹

In any event, the Bureau's caricature of the Petition as "various instances of alleged misconduct by Waugh in personal business dealings"¹² highlights the fundamentally flawed premise behind the settlement agreement: that Preferred's misconduct was limited exclusively, or even primarily, to Waugh. This is far from the truth, and the "23-page filing"¹³ is replete with clear instances of misrepresentations

Commission should revoke the above-captioned licenses, those are not currently pending before the Commission").

¹⁰ Opposition 4-5, n.12 (*italics added*) ("none of the referenced regulatory provisions is even arguably applicable to, or supports a request for, intervention in an adjudicatory revocation hearing proceeding.").

¹¹ While Petitioner does propose "issues in addition to those already designated for hearing" (i.e., satisfaction of his nondischargeable judgment), this is plainly permitted by Section 1.223(c).

¹² Opposition, 3:6.

¹³ Opposition 3:6.

and lack of candor before the Commission by Waugh, **together with Charles Austin ("Austin") and Preferred**--the actual holder of FCC licenses.¹⁴ Although the Opposition claims that the Petition is "substantively unavailing,"¹⁵ it fails to respond in any way to the substance of these allegations, seeking rather to dismiss them all as "Waugh-issues."

This tactic of making Waugh a scapegoat in order to approve the settlement should not allow the Bureau to turn a blind eye to Preferred's misconduct.¹⁶ Preferred is surely guilty of some misconduct, or why would the settlement agreement include a "\$100,000 voluntary contribution" (but not a fine, because the agreement ostensibly requires that no parties, i.e., Preferred, admit wrongdoing) "and a compliance plan aimed at deterring any potential violations of the nature designated for hearing in this case"?¹⁷ This backroom handshake-deal between Preferred and the Bureau, implying that the blame for any misconduct

¹⁴ These instances include Waugh and Austin's **co-implementation** of a trust designed to circumvent Commission rules regarding company ownership, which allowed Preferred to participate in Auction 34. This trust, regardless of its questionable legality, was deceptively named, and its true nature was hidden from the Commission. Other instances of deception, not limited exclusively or even primarily to Waugh, include Austin's misrepresenting company ownership in applications for licenses, failing to file transfer of control applications, and hiding from the Commission Waugh's significant role in the company, which was clearly much more than that of a consultant, to name a few.

¹⁵ Opposition, 2:3.

¹⁶ Opposition 5:9.

¹⁷ Opposition 5:9.

lies at the feet of deceased Waugh, lacks the transparency that the public deserves, and is not a dispute resolution mechanism that is in either the Commission's or the public's interest, conservation of resources arguments notwithstanding.

The Bureau contends that an average layperson being unaware of a new FCC proceeding is "no legitimate explanation" for failing to request intervention within the 30-day timeframe and that Petitioner received constructive notice through publication in the Federal Register. Such a strict approach would burden the public with the unrealistic and unworkable requirement of reviewing every 30 days the many FCC proceedings published in the Federal Register, most of which have little direct relevancy to the interests of ordinary citizens. Petitioner gladly would have filed a petition to intervene within the August 31, 2007, timeline, or at least earlier than 2010, but like the vast majority of people, is not regularly updated regarding new FCC proceedings and was not notified of the aforementioned proceeding, despite Waugh mentioning to the Bureau Petitioner by name.¹⁸ As soon as Petitioner discovered an internet reference to Waugh in 2010, leading him to the Order to Show Cause, he acted expeditiously by contacting the Commission to take certain actions. The Bureau responded to Petitioner by informing him that his written "presentation" could "not be made to decision-making personnel" unless "it was served on the parties to the proceeding," and

¹⁸ *Deposition of Pendleton Waugh*, January 26, 2009, 4:7.

was told to “[p]lease serve a copy of [his] correspondence on all the parties.”¹⁹ Petitioner accordingly served his presentation on all the parties and soon thereafter submitted his *Opposition To Motion To Strike*, October 26, 2010, p2 n.2, which stated that although he believed he was qualified to intervene pursuant to Section 1.223(c), he was already a party based on grounds set forth in greater detail in *Mr. Toshiaki Saito’s Memorandum Regarding The Enforcement Bureau’s Statement Of Clarification*, October 28, 2010. Thus, rather than having sat on his right to petition to intervene for two years, as the Bureau suggests, Petitioner reasonably believed that a petition to intervene was unnecessary since he was already a party under alternative grounds.

Regardless of the merit of those grounds, and despite Petitioner’s multiple filings over the past two years he has not been given any definitive position from decision-making personnel advising him whether or not he is a party. This abstention, in conjunction with the letter from the Bureau, at the very least makes Petitioner a de facto party.²⁰

¹⁹ *Enforcement Bureau Letter*, July 21, 2010.

²⁰ Petitioner’s affidavit was required under Section 1.223(c) and applies to facts related to the petition to intervene (i.e., Petitioner was defrauded while engaged in the business of wireless licenses, Petitioner had no knowledge of the proceeding prior to 2010, etc.). The Bureau correctly points out that Petitioner does not have personal knowledge of all the information referenced by the depositions.

Petitioner's significant interest in the proceeding is more than simply a "personal debt" against Waugh;²¹ rather, it is nondischargeable judgment against Waugh and **many of the companies Waugh cofounded and owned**. Austin has a long history of forming companies to implement the business plans Waugh orchestrated, and Preferred is no exception, as is clearly evident from the Petition, the record, and as will surely become more apparent once a hearing for revoking Preferred's licenses is fully engaged.²²

The Opposition states that the Commission is "plainly the wrong forum" for a defrauded investor in wireless licenses to petition for license revocation, reauctioning, and the repayment of his debt. Yet the Bureau cites no authority for such limited FCC jurisdiction, while Petitioner on the other hand cites the D.C. Circuit Court of Appeals, which has repeatedly affirmed the view that deference to the Commission is


²¹ Opposition 4:6.

²² The Opposition also misinterprets Petitioner's suggestion that the licenses "be auctioned off with the proceeds going to pay Mr. Waugh's creditors, Petitioner included." However, while Petitioner was suggesting the repayment of *Preferred's* creditors (such as Petitioner and the estate of Chandra Patel), the Bureau presents an interesting solution that would take advantage of the Commission's broad discretionary powers to fashion remedies. That is, rather than revoke the licenses, the Commission could revise the settlement to include Waugh's trust, which would then be used to satisfy Petitioner's nondischargeable judgment, with any of the remaining proceeds being delivered to Waugh's other creditors and his estate. While such a solution might discourage the defrauding of investors in the communications industry, and benefit the Waugh estate, it would still leave licenses in possession of an entity that has made misrepresentations and lacked candor before the Commission, and that might easily do so again, and would therefore not be in the public interest.

“particularly broad when [the] agency is concerned with fashioning remedies”²³ and that “administrative agencies [are not] alien intruders poaching on the court’s private preserves of justice.”²⁴

Based on the foregoing, Petitioner respectfully requests that the Settlement Agreement be invalidated as it leaves licenses in the hands of licensees that have made misrepresentations and lacked candor before the Commission. Petitioner further respectfully requests that the licenses be revoked and reaucted to more trustworthy licensees, with the proceeds being used to serve the public interest, and a portion thereof satisfying the nondischargeable judgment of a defrauded investor in wireless licenses, Mr. Toshiaki Saito.

DATED: Honolulu, Hawaii, February 21, 2012.



KEVIN W. HERRING 6722-0
STEVEN R. GRAY 9434-0
Attorneys for Petitioner/
Interested Party
Toshiaki Saito

²³ *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)

²⁴ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 160 (D.C. Cir. 1967)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter	)	EB Docket No. 07-147
)	
PENDELTON C. WAUGH, CHARLES M.	)	File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP)	
)	
PREFERRED COMMUNICATION	)	NAL/Acct. No. 200732080025
SYSTEMS, INC.)	
)	
Licensee of Various Site-by-Site	)	FRN No. 0003769049
Licenses in the Specialized Mobile)	
Radio Service)	
)	
PREFERRED ACQUISITIONS, INC.	)	FRN No. 0003786183
)	
License of Various Economic Area)	
Licenses In the 800 MHz Specialized)	
Mobile Radio Services)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing shall be duly served upon the following persons by mailing said copy, postage prepaid, first class mail, in a United States post office at Honolulu, Hawaii, on February 21, 2012, at their address of record:

Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.S., Room 1-C861
Washington, D.C. 20554
richard.sippel@fcc.gov

Joel Kaufman, Esquire

Associate General Counsel
Federal Communications Commission
445 12th Street, S.W., Room 8-A666
Washington, D.C. 20554
joel.kaufman@fcc.com

Gary A. Oshinsky, Esquire

Investigations and Hearing Division
Federal Communications Commission
445 12th Street, S.W., Room 4-C330
Washington, D.C. 20554
gary.oshinsky@fcc.gov

P. Michele Ellison

Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., 3d Floor
Washington, D.C. 20554

Anjali K. Singh, Esquire

Investigations and Hearing Division
Federal Communications Commission
445 12th Street, S.W., Room 4-C330
Washington, D.C. 20554
anjali.singh@fcc.gov

William D. Silva, Esquire

Law Offices of William D. Silva
P.O. Box 1121
Stevensville, MD 21666
bill@luselaw.com
Attorney for Pendleton C. Waugh

Jay R. Bishop

P.O. Box 5598
Palm Springs, CA 92262
jaybishopps@aol.com
michellebishopps@aol.com

Michael D. Judy
5874 East Nees
Clovis, California 93611

Charles M. Austin
Preferred Acquisitions, Inc.
Preferred Communication Systems, Inc.
400 East Royal Lane, 9 Suite N-24
Irving, TX 75039
precormsys@aol.com

David L. Hill
Hall Estill, Hardwick, Gable, Golden & Nelson, P.C.
1120 20th Street
Suite 700, North Building
Washington, DC 20036

DATED: Honolulu, Hawaii; February 21, 2012.



KEVIN W. HERRING
STEVEN R. GRAY
Attorneys for Petitioner/
Interested Party
TOSHIAKI SAITO